(2012) 03 KL CK 0162

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 26883 of 2011 (I)

M.P. Vijayalekshmi, Upper Primary School Assistant, NSS, Upper Primary School, Punnapra, P.O., Alappuzha-688004, Residing at Muralisadanam(H), Punnapra, P.O., Alappuzha, PIN-688004 — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision : 23-03-2012

Acts Referred:

Kerala Education Rules, 1959 — Rule 4, 62, 8
Kerala Service Rules, 1958 — Rule 60

Citation : (2012) 3 KLJ 149 : (2012) 3 KLT 200

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : Abraham Vakkanal, Sri. Paul Abraham Vakkanal, Sri. Dijo Sebastian, Smt. Vineetha Susan Thomas and Smt. Jasmy Kattoor, for the Appellant; John Joseph, for R5 Advocate Smt. Thanuja Roshan, Smt. Lowsy. A, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Justice T.R. Ramachandran Nair

1. Essentially, the question posed herein is regarding the date of retirement of an incumbent in the post of Headmaster, the consequential filling up of the vacancy by promoting the fourth respondent and other allied matters. The petitioner is aggrieved by Exts.P6 and P9 orders wherein the view taken is that the fourth respondent was rightly promoted as Headmistress. The circumstances leading to the dispute are the following: Prior to the promotion of the fourth respondent, one Shri K. Prasannakumar, was the Headmaster of the school. His date of attainment of superannuation on completion of 55 years, was 24.11.2010. Since the said date is one coming within the course of the academic year, he continued upto 31.3.2011 in terms of the relevant provisions of the Kerala Education Rules, (for short K.E.R.), viz. Rule 62 of Chapter XIV-A and Rule 60(c) of Part I of

Kerala Service Rules (for short K.S.R.), according to the petitioner. But the petitioner maintains that the eligibility for promotion will have to be reckoned as on 24.11.2010, the date on which he attained the age of 55 years and if that be so, the petitioner had to be promoted. But ignoring her claim, the fourth respondent was promoted from 1.4.2011. The claim of the petitioner is based on the premise that among the seniormost teachers, she had acquired the qualification as on the date of occurrence of vacancy. Accordingly, she claimed the promotion, but the Manager rejected it as per Ext.P2. The Manager relied upon the Government orders, which came into force, concerning the unification of retirement. Ext.P4 is the copy of G.O. (P) No. 154/09/Fin. dated 24.4.2009 which, according to the petitioner, is not applicable in the case of aided school teachers. This was the point raised by the petitioner before the appellate authority who rejected her appeal as per Ext.P6 order. Finally, the matter reached the Government and the Government also concurred with the view, in Ext.P9. In a nutshell, the view taken by the Government is that the benefit of extended period of service due to unification of retirement given to Government employees, has been extended to aided school teachers also.

2. Heard learned Senior Counsel for the petitioner, Shri Abraham Vakkanal, learned Government Pleader Smt. Lowsy A. and learned counsel for the fourth and fifth respondents, Shri John Joseph.

3. Going by the date of attainment of superannuation of the fourth respondent as per the rules, she will be retiring on 31.3.2012. Therefore, learned Senior Counsel for the petitioner submitted that even though the petitioner is not interested in cancellation of the promotion granted to the fourth respondent, the next arising vacancy should be given to the petitioner. According to the learned Senior Counsel, the attempt of the Manager is to give the same to the fifth respondent on the plea that the fifth respondent is senior to the petitioner and is qualified.

4. The respondents have filed separate counter affidavits.

5. Learned Senior Counsel for the petitioner, Shri Abraham Vakkanal submitted that Ext.P4 applies to Government employees and the unification of retirement age will allow them to continue till the end of the financial year. Even if the same has been extended to aided school teachers, herein what is important is Rule 62 of Chapter XIV-A K.E.R. The fourth respondent''s attainment of superannuation on completion of 55 years is within one month from the date of reopening, viz. 20.5.2011. The said date does not fall during the academic year 2011-2012 and therefore she had to retire on 31.3.2011 as per Rule 62 of Chapter XIV-A K.E.R. If that be so, she could not have been given promotion from 1.4.2011.

6. Learned counsel for the fourth respondent, Shri John Joseph submitted that in the light of the unification of retirement age, what is relevant is the right of a person to continue till the end of the financial year and Rule 62 of Chapter XIV-A K.E.R. will not have applicability and precedence in such circumstances. In the

light of the said orders, the fourth respondent was entitled to continue till the end of the financial year and accordingly she was promoted. It is made clear in Ext.P10 order that during the extended period the persons concerned will be eligible for various service benefits including promotion. Hence, the promotion granted is perfectly justified.

7. In the light of the contentions raised by both sides, a reference to the statutory rules is necessary. As far as the age of retirement of aided school teachers are concerned, the relevant provisions have been incorporated in the K.E.R. Rule 4 of Chapter XXVII-B of K.E.R. provides as follows:

4. The date of compulsory retirement on superannuation applicable to teachers of Government schools shall apply to teachers of aided schools.

In Rule 8 of Chapter XXVII-A the age of retirement is fixed, which reads as follows:

8(1) The age of retirement on superannuation shall be fifty five years.

Provided that those who were already in service in any aided school prior to the 4th September 1957, the age of retirement on superannuation shall be sixty years.

Rule 62 of Chapter XIV-A K.E.R. concerns retirement of teachers which is reproduced hereunder:

62. Retirement: A teacher who completes the age of retirement during the course of an academic year but not within one month from the date of reopening shall continue in service till the close of the school for the mid-summer vacation. But if he is on leave on such date with no prospect of returning to duty or on leave from the commencement of the academic year to the date of superannuation he may be retired on the due date. If the teacher applies for any leave other than casual leave during the period of his continuance under this rule beyond the age of retirement he shall be retired forthwith.

Provided that in cases where the academic year is extended beyond the 31st day of March in any year a teacher to whom this rule is applicable shall retire on the last day of March itself.

Provided further that the extended period of service beyond the actual date of superannuation of the teacher shall not be reckoned as qualifying service for promotion, increment and pension, and the provisions of sub-rule (c) of rule 60 of Part I of the Kerala Service Rules shall apply to the teacher.

Going by the same, the teacher who completes the age of retirement during the course of an academic year, can continue till the close of the school for summer vacation. The exception is in the case of one who completes the said age within one month from the date of reopening.

8. The Government Orders Exts.P4 and P9 have resulted in amendments in the

Kerala Service Rules. Rules 60(a) and 60(c) of Part I K.S.R. are the respective provisions. Rules 60(a) and 60(c)) are included in Chapter VIII, which is under the heading "Compulsory Retirement". Rule 60(a) is extracted below:

60 (a). Except as otherwise provided in these rules the date of compulsory retirement of employees and teachers shall take effect from the afternoon of the last day of the financial year in which they attain the age of 55 years. They may be retained after this date only with the sanction of Government on public grounds which must be recorded in writing, but they must not be retained after the age of 60 years except in very special circumstances.

Note:- The extended period of service under sub-rule (a) shall be reckoned for all service benefits such as increment, pension, higher grade, accrual of leave, promotion and pay revision.

Rule 60(c) and Note 1 therein, are as follows:

60(c). The teaching staff of all Educational Institutions including Principals of Colleges where the academic year ends on a date subsequent to 31st March, shall continue in service till the last day of the month in which the academic year ends.

Note 1: The extended period of service under sub-rule) shall be reckoned for all service benefits such as increment, pension, higher grade, accrual of leave, promotion and pay revision.

(other parts of this rule are omitted as not relevant)

9. Exts.P4 and P10 are the Government Orders, issued prior to these amendments, providing for unification of retirement age. They are dated 24.4.2009 and 30.4.2009 respectively. Ext.P4 was in respect of Government employees and teachers, which was extended to various categories including aided school teachers, by Ext.P10. Thereafter, consequential amendments were effected in the K.S.R., as above, with effect from 24.4.2009.

10. In fact, before the amendment of Rule 60(a), the relevant rule provided that "except as otherwise provided in these rules the date of compulsory retirement of an officer shall take effect from the afternoon of the last day of the month in which he attains the age of 55 years." Therefore, such an officer will have to retire based on the month in which he attains the age of 55 years. The unification now made as per the amendment will allow the persons to continue in service upto the afternoon of the last day of the financial year in which he attains the age of 55 years. Earlier, Rule 60(a) was applicable only in the case of "an officer" and as per the amendment it is applicable in respect of "employees and teachers." The unamended Rule 60(c) was applicable in respect of teachers which provided that "the teaching staff of all Educational Institutions (including Principals of Colleges) who complete the age of 55 years during the course of an academic year shall continue in service till the last day of the month in which the academic year ends." This is the material part of the rule. In Rule 60(c), there

was a similar provision like Rule 62 of Chapter XIV-A K.E.R., providing that "if, however, the day on which the teaching staff including Principals of Colleges attain the age of 55 years falls within the period of one month beginning with the day of re-opening of the institutions they shall cease to be on duty with effect from the date of such re-opening and they shall be granted additional leave from the date of re-opening to the last day of the month in which they attain the age of 55 years." The entire Rule 60(c) has been now substituted in the present form. In fact, the amendments as now introduced in the K.S.R. have conferred various benefits like increment, pension, higher grade, accrual of leave, promotion and pay revision reckoning the extended period of service which was not the provision as per the unamended rule 60(c) in the K.S.R.

11. The question therefore is whether, in the light of unification of retirement age and the provision for continuance till the end of the financial year, the argument of the petitioner could be sustained.

12. Going by the above provisions, it can be seen that as far as the retirement age is concerned, it is 55. As per Rule 4 of Chapter XXVII-B of K.E.R., the date of compulsory retirement on superannuation as applicable to Government school will apply to aided school teachers also. After the amendment of Rule 60(a) of Part I K.S.R., one thing to be noticed is that all teachers are brought within the purview of Rule 60(a) also. I had occasion to consider the scheme under the amended provisions of Rules 60(a) and 60 (c) of Part I K.S.R., in the judgment in W.P.(C) No. 13018/2009. It was held therein, in para 11 thus:

11. Going by the unamended provision the Government employees were covered by sub-rule (a) of Rule 60 and Teachers were governed by sub-rule (c). The extended period of service available to teachers, cannot be reckoned for any service benefits like increment, pension, higher grade promotion etc. as per the said provisions. Now, after the unification of the retirement age, going by the notes added to sub-rule (a) and sub-rule (c), the extended period of service shall be reckoned for all service benefits such as increment, pension, higher grade, accrual of leave, promotion and pay revision. Going by the unamended rule 60(a), the officer has to compulsorily retire from the afternoon of the last day of the month in which he attains the age of 55 years. Presently, the employees and teachers will compulsorily retire from the afternoon of the last day of the financial year in which they attain the age of 55 years.

Therefore, both teachers and Government employees are taken care of under Rule 60(a). Even if they attain the age of 55 years during a financial year, the compulsory retirement will take effect only on the last day of the said financial year.

13. Note 1 to Rule 60(c) confers various benefits even during the extended period of service including promotion. The relevant provisions of Rule 60(c) as unamended in this respect, have also been modified by the amended Rule 60(c). Therefore, what is important is Rule 60(a) of Part I K.S.R., as far as teachers also

are concerned, to consider the day on which the date of compulsory retirement will take effect. It is clearly the last day of the relevant financial year.

14. Learned Senior Counsel for the petitioner submitted that in the light of Rule 62 of Chapter XIV-A K.E.R., Rule 60(a) of Part I K.S.R. will not apply as far as the fourth respondent is concerned. I cannot agree. Rule 62 of Chapter XIV-A K.E.R. and its scope will have to be understood and will have to be harmoniously interpreted in the light of the amended provisions of Rule 60(a) of Part I K.S.R. That the provisions regarding retirement of Government school teachers will apply to aided school teachers also, admits of no doubt in the light of Rule 4 of Chapter XXVII- B of K.E.R. Therefore, the contention raised by the learned Senior Counsel for the petitioner that Rule 60(a) will not apply to aided school teachers, cannot be accepted. There cannot be any distinction between Government school teachers and aided school teachers, going by Rule 4 of Chapter XXVII-B K.E.R.. What is attempted by Rule 60(a) is the unification of retirement age of Government employees and teachers. If that be so, the benefit will go to the aided school teachers also. This is the view taken in Exts.P6 and P9. In Ext.P9, the Government relied upon the Government Order, Ext.P10. The same is dated 30.4.2009. As far as the fourth respondent is concerned, she was promoted only after the coming into force of Ext.P10. In fact, now the rules have also been amended. Therefore, the main contention raised in the writ petition that the Government orders Exts.P4 and P10 may not apply to aided school teachers, being executive orders, cannot have any relevance in the light of the amendment of the statutory rules of Part I K.S.R.

15. Learned Senior Counsel for the petitioner relied upon various decisions of this Court and Apex Court, viz. Manju v. State of Kerala 2005 (1) KLT SN 98, C. No. 122, Achhaibar Maurya v. State of U.P. 2008 (1) KLT 213 SC, Union of India (UOI) and Others Vs. A.N. Viswambaran and Others, , K. Unni Narayanan, Manager and Others Vs. State of Kerala and Others, , Moosakutty Vs. D.E.O., and Smitha Johny v. Josny Varghese and others ILR 2010 (4) Ker. 533, to point out that date of occurrence of vacancy is material, that special rules will govern wherever provisions are there and that executive orders cannot go against the statutory prescriptions. The legal position as above, will have to be examined in the light of the statutory rules here. Rule 62 of Chapter XIV-A K.E.R. actually enables continuance till the end of the academic year, i.e. 31st of March and the said provision is incorporated in the rule also with the object that it may not apply to persons who completes the age of retirement within one month from the date of reopening. The contention pointedly raised is that special law will exclude the general. But that concept is no longer applicable in the light of the unification of retirement age as per Rule 60(a) of Part I K.S.R. which is a later general rule. Therefore, the later general rule herein will squarely apply. It is a well settled principle of interpretation that there is a distinction between a specific provision in a general statute and a special law. See Maru Ram and Others Vs. Union of India (UOI) and Others, . It was held that a specific provision dealing with a particular situation would override even a special law, which is inconsistent with.

The unification of retirement age, is a specific provision dealing with a particular situation engrafted in Part I Rule 60(a) of K.S.R. It applies to aided school teachers. Rule 4 of Chapter XXVII-B of K.E.R. also takes care of its application further. Hence, the date of compulsory retirement will take effect on the last day of the financial year in which they attain 55 years. This being a particular provision in the General Rules, will override Rule 62 of Chapter XIV-A K.E.R., even in the case of an inconsistency. In that view of the matter, Rule 62 of Chapter XIV-A K.E.R. may not help the contentions of the petitioner. Both the academic year and financial year end on 31st of March. Therefore, the continuance of the fourth respondent after the promotion, is justified in the light of Rule 60 (a) of Part I K.S.R. which is the contention raised by the learned counsel for the fourth respondent. It can also be seen that the previous Headmaster continued upto 31.3.2011, based on the same Government Orders also read with the rules. Therefore, actually the promotion of the fourth respondent was effected from 1.4.2011 which alone is the date of occurrence of vacancy. In the light of the amended provisions of Rule 60(a) of Part I K.S.R., the fourth respondent was also entitled to continue till the end of the financial year. Therefore, the promotion of the fourth respondent does not suffer from any infirmity. What remains is the eligibility of the fifth respondent for promotion. The vacancy is yet to arise. Therefore, the question of promotion will be considered by the Manager in terms of the date of occurrence of vacancy, and the eligibility and qualification of the teachers competing for promotion.

The writ petition fails and the same is dismissed. No costs.